No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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In their motion to affirm the United States and the Commission state the Commission's finding and conclusion in this case to be that "the members and trustees of Pacific, and no other person, bore the essential risks and burdens of the Association," and that this holding is in accord with the Commission's prior decisions, notably *Atlanta Shippers Association, Inc.—Investigation,* 322 I.C.C. 273, 283-288 (1964). In the next breath they then state that the position the Commission has articulated in *Atlanta Shippers* is that "it is sufficient that these risks [of operation] *not* be borne by any party other than the shipper association itself, whatever its limitations on individual member liability . . . ."

By their motion Appellees have thus demonstrated the very reasons why this Court should entertain plenary review of this appeal. First, they make clear that, notwithstanding the district court's ruling that the issue of risk is answered by "the terms of the statute itself" rather than the "various interpretative pronouncements of the Commission," the Commission's order can be sustained, if at all, on the rationale of the *Atlanta Shippers* case. Second, they now confirm that the rationale of *Atlanta Shippers* gives rise to two diametrically opposed requirements of risk. Manifestly, if as the Commission here found, the shipper members, and no other persons, bear the essential risks of the association, it is neither sufficient nor logical that these risks "be borne" by the "association itself." Conversely, if shippers are free to create a freight forwarding corporation which assumes all risks and burdens of the transportation, it was irrelevant and immaterial for the Commission here to conclude, albeit with no supporting findings or evidence, that the members of Pacific bear these risks and burdens.[1] The ultimate issue before the Commission in this case was whether the financial risks of the exempt freight forwarding operation must be borne by the shipper members of the association, or whether shippers are free to shift this risk to the association itself. Appellees now candidly admit that the Commission's holding on this point is equivocal, and establishes an ambiguous standard which, on the one hand, purports to require risk to be on the members, while on the other leaves the members free to place the risk on the association.

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[1] Appellees assert that this holding is supported by adequate findings and based upon substantial evidence of record. However, they do not favor the Court with citations to concrete evidence or specific findings to this effect, choosing instead to make a general reference to 74 pages, or substantially all of the voluminous examiner's report in the proceeding (JS App. 16a-90a). A perusal of that report and the record underlying it discloses no findings and not a scintilla of evidence which would support this holding.

Appellees concede that the Commission's rule in *Atlanta Shippers* is intended to be an application of this Court's decision in *United States* v. *Drum*, 368 U.S. 370 (1962). They argue, however, that "that case requires only that a shipper (in the present case, the association) bear the burden of the operation" and "says nothing of the question of individual liability of members of the Association." (Motion to Affirm, p. 4, n. 1). True, *Drum* says nothing about the liability of a shippers' association member for the simple reason that that case did not deal with Section 402(c), but involved the private carriage exemption in Part II of the Act, 49 U.S.C. § 303(a)(17). Having recognized that the principle there decided is applicable in determining the status of a shippers' group claiming exemption under Section 402(c), Appellees test the credibility of the Court with their fallacious analogy between the shipper in *Drum* and the association here.

In *Drum* a shipper, claiming to be performing his own transportation as a private carrier, utilized the vehicles of unlicensed owner operators who bore the essential risks and burdens of the operation. This Court held that this arrangement was not private carriage by the shipper but for-hire carriage by the owner operator without proper authority. Here, the counterpart of the shipper in *Drum* is not the association, but its individual shipper members who, claiming to be performing their own transportation, collectively utilize the unlicensed services of the association which they have purposely created in corporate form to assume the essential risks and burdens of the transportation.

Appellees' attempt to equate the incorporated association to that of the shipper who must bear the risk of transportation is directly contrary to the holding in *Atlanta Shippers*.[2] There the Commission took care to point out

[2] The argument is also incompatible with *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950) where this Court held that the association at all times acts as the agent of the shipper members who are the principals, and with *Regulations for*

that the physical characteristics of a regulated forwarder and an unregulated shippers' association "are identical for all practical purposes," in that both ordinarily assemble and consolidate or provide for the assembling and consolidation of shipments; both normally perform or provide for the performance of break-bulk and distributing operations with respect to such consolidated shipments; and both utilize, for at least part of the transportation, the services of a carrier or carriers subject to Parts I, II, or III of the Act. The only functional distinction between the two is that, whereas the regulated forwarder performs these services for the general public for compensation, the unregulated association performs them only for its members without compensation. 322 I.C.C. at 280. Just like a regulated forwarder, a shippers' association is a shipper *vis a vis* the Part I, II or III carriers it utilizes for the underlying transportation. And just like a forwarder, the association acts as a carrier *vis a vis* the shipper whose shipments it accepts for transportation. It is precisely this similarity between an unregulated association and a regulated forwarder which the Commission, in *Atlanta Shippers*, said necessitates a test of substance which will determine "whether the group or association (or the shipper-members through their organization) is purchasing transportation in which the essential risks and burdens" of the services are assumed for the association's members by a person not licensed by the Commission. 322 I.C.C. at 279.

Appellees claim the district court did not reject the Commission's rationale in this case, but "rather . . . found it unnecessary to discuss the Commission's reliance on *Atlanta Shippers*." (Motion, p. 5). This is a distinction without a difference. The specific reason given by the district court for ignoring the reasoning of the Commis-

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the Payment of Rates and Charges, 326 I.C.C. 483 (1966) cited by Appellees, where the Commission insisted that the shipper members are responsible as the beneficial owners of the goods moved, and can place no effective insulation between themselves and third persons.

sion was that "the answer to the problem is more easily reached by direct consideration of the terms of the statute itself." (J.S. App. 5a). Yet, the crux of the Commission's rationale here and in *Atlanta Shippers* was that the problem cannot be resolved by the terms of the statute. The Commission stated in *Atlanta Shippers*, 322 I.C.C. at 278:

> "Whether any particular transportation function is, in substance, a forwarding service, the unauthorized sale of which is prohibited by the statute, can be determined only after careful and complete analysis of all the facts and circumstances surrounding the performance of such transportation. And compliance with the act's regulatory requirements cannot be evaded by means of subtle arrangements or shades of form if the substance and basic nature of the operation bring it within the purview of the law. It is not enough, however, for us merely to examine the facts in a particular case and, applying an unelaborated test of substance, to declare whether a given operation is or is not service subject to part IV of the act. If the purposes of the law are to be accomplished, and if the regulation expected of us is to be practicable, it must be intelligible to those regulated. Stated differently, in a case like the present, *we must distill from the statute, criteria by which the public also can readily and accurately classify a particular activity.* We must go a step beyond the bare conclusion to declare those considerations which lead us to it, and thereby establish a guide for the future as well as a judgment on the past." (Emphasis supplied).

To attain this end, the Commission went on to say that it was essential for it to identify and examine the troublesome and doubtful situations "in distinguishing between regulated freight forwarder service and non-regulated *but physically similar* operations of nonprofit groups or associations of shippers." (*Id.*, emphasis supplied). It then articulated as the standard in making this determination a test which prohibits persons other than the shipper members to assume the essential risks and burdens of the

transportation. It is this rationale and this standard which the district court ignored and Appellees would now disavow.

Hence, it is not irrelevant, as Appellees contend, that the district court decided the case on the basis of the statute instead of the Commission's construction thereof. In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943) on which Appellees rely, this Court held that a commission decision must be upheld, if at all, on the basis of the rationale on which the agency relies. The district court here not only ignored the Commission's reasoning, but affirmed the Commission's order by substituting its own rationale which is at direct odds with that of the Commission. Since, as Appellees now make clear, the Commission's holding in *Atlanta Shippers* is ambiguous and irrational, and, as Appellants have pointed out (J.S., p. 37), that decision has never been subject to judicial review, plenary review by this Court is imperative.

None of the three motions to affirm filed by the various Appellees mentions much less discusses the decision of the United States District Court for the Central District of California in *North American Car Corporation, et al.* v. *United States Rubber Company, et al.* (May 8, 1967, unreported, J.S. App. 103a, et seq.). Thus, as they did in the district court, Appellees continue to acquiesce in that decision holding that the shipper members of an incorporated association are liable for none of the financial obligations incurred by the association in performing transportation on their behalf. In no manner can this acquiescence be reconciled with the Commission's decision here that the members bear the risk of such obligations. Moreover, the transparent and *post hoc* rationalizations[3] of Appellees' counsel in attempting to reconcile the Commission's contradictory positions is now being pursued by the Commission itself. Appended hereto is the Commission's decision in Docket No. MC-C-

[3] *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

3192 (Sub-No. 7), *National Motor Freight Traffic Association, et al.* v. *Columbia Shippers Association, Inc., et al.*, 105 M.C.C. 846 (1967). There, as here, the Commission held to be bona fide and exempt under Section 402(c), an incorporated association organized so as to immunize its members from all risk and liabilities of the transportation. In arriving at this result, the Commission in three consecutive and relatively brief paragraphs stated the applicable test to be that the *shipper members* must bear the financial and other risks and burdens of the association; concluded, with no supporting findings, that the *members* of Columbia bear these risks; proceeded to the contrary conclusion that the essential risks and burdens, rather than being upon the members, are upon the wholly separate *incorporated entity of Columbia itself;* and finally held, directly contrary to the test it declared to be applicable, that the assumption of such risks by the *association* is sufficient. The Commission then caps this astounding confusion with the quotation from *Atlanta Shippers* to the effect that the shipper members of a nonregulated association are responsible as the beneficial owners of the freight and cannot insulate themselves from third persons. 105 M.C.C. at 851-852 (App. 18-21). Appellants have appealed this remarkable decision to the United States District Court for the District of Delaware where the case is now in the process of briefing. Civil Action No. 3553, *National Motor Freight Traffic Association, Inc., et al.* v. *United States, et al.*

The rationale of *Atlanta Shippers* as the Commission purported to apply it here and in *Columbia Shippers* is not intelligible to the regulated transportation industry, does not accomplish the purpose of the law, and cannot achieve the practicable regulation which the public, the transportation industry, the Congress and the courts expect of the Commission. In this respect, the dissenting opinion of Commissioner Walrath in *Atlanta Shippers* is both prophetic and a compelling statement of the reasons why plenary

review is required by this Court. Speaking for five members of the eleven-man Commission, he stated, 322 I.C.C. at 298:

> "Part IV of the act was promulgated to regulate the business of freight forwarders, but in regulating freight forwarders, the Congress concomitantly intended to "foster sound economic conditions in transportation and among the several carriers." Thus when confronted with a question of statutory interpretation, our role, as I see it, is to give effect to the design of Congress, particularly where the language of the statute is consistent with the objectives of the national transportation policy. Cf. *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534. To my mind, the result reached by the majority flies in the face of congressional intent, for instead of encouring a viable freight forwarder industry, the decision threatens its continued existence. Therefore, even had I doubts as to the validity of the conclusions in the prior report—and I have none—I would still feel that the public interest impelled the conclusion reached there. Then, if in a proper test of the corporate issue in the courts a contrary conclusion were reached, I would urge that the Commission promptly bring the matter to the attention of the Congress in the interest of final clarification; for I know of no effective method to curb the abuses of shipper association privileges under the majority's decision. A case-by-case handling of questionable corporate structures is simply unworkable."

CONCLUSION

For the foregoing reasons and those stated in their Jurisdictional Statement, Appellants urge the Court to deny the motions to affirm, note probable jurisdiction of this appeal, reverse the judgment of the district court, and remand the case to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX

Served October 27, 1967

M-11664

INTERSTATE COMMERCE COMMISSION

No. MC-C-3192 (SUB-NO. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

No. MC-C-3192 (SUB-No. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

Decided October 12, 1967

Upon reconsideration, findings in prior decision and order dated November 2, 1965, reversed, defendants found to be providing or participating in certain freight forwarder operations, in interstate commerce, in violation of section 410(a) of the Interstate Commerce Act. Cease and desist order entered.

Eugene T. Liipfert and *Bryce Rea, Jr.*, for complainants.

Leonard A. Jaskiewicz, Joseph E. Keller, and *Ronald N. Cobert,* for defendants.

Giles Morrow and *James L. Givan* for intervener in support of complainants.

Joe G. Fender, Leonard Monzeon, Charles A. Washer, Leonard A. Jaskiewicz, and *Ronald N. Cobert,* for interveners in support of defendants.

REPORT OF THE COMMISSION ON RECONSIDERATION

MURPHY, *Commissioner:*

This proceeding, which involves consideration of the proper functions of an association of shippers under section 402(c) of the Interstate Commerce Act, was desig-

nated as being of general transportation importance by order of the Commission dated December 7, 1965. Subsequently, upon consideration of petitions for reconsideration filed by complainants and by the Freight Forwarders Institute, of the replies thereto, and for good cause shown the proceeding was reopened for reconsideration by order dated April 14, 1966.

By complaint filed February 24, 1961, complainants, National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference of American Trucking Association, Inc., and the Common Carrier Conference-Irregular Route, allége that defendants, Columbia Shippers Association and Duane F. Barnes, an individual, both of Philadelphia, Pa., have been, are now, and will continue to be, engaged in certain practices in violation of sections 206(a), 209(a), and 410(a) of the Interstate Commerce Act and seek issuance of an order directing defendants to cease and desist from the alleged violations and granting such other and further relief as may be warranted. The Freight Forwarders Institute has been permitted to intervene in support of complainants and American Institute for Shippers Association, Inc., American Retail Federation, National Conference of Non-Profit Shipping Associations, Inc., and National Retail Merchants Association have also been permitted to intervene in this proceeding. All parties will be referred to by short titles.

In the prior decision and order, dated November 2, 1965, division 1 stated (1) that the examiner properly placed the burden of proof on the ecomeplainants, citing *National Motor Freight Traffic Association, et al* v. *United States, et al.*, 242 F. Supp. 601 (1965), (2) that the record supports a finding that complainants failed to adduce sufficient evidence upon which the Commission could properly reach a conclusion that defendants were engaged in any unlawful coloading practices or were conducting operations as a forwarder within the meaning of section 402(a)(5) of the act, and (3) that the com-

plaint should be dismissed. The principal issues raised on petition are whether the association defendant bears the essential risks and burdens as required by the criteria set forth in *Atlanta Shippers Assn., Inc.—Investigation*, 322 I.C.C. 273; whether the burden of proof was properly placed, and whether the association properly may coload with nonmembers.

FACTUAL BACKGROUND

The essential facts are not disputed. Columbia Shippers Association is a nonprofit association of about 38 shipper-members who do business in the Philadelphia commercial zone. Over 95 percent of the volume of traffic handled by the association consists of truckload shipments moving in plan III "piggyback" service whereby the railroad furnishes only a transportation service between its trailer-on-flatcar ramps. The pertinent rail tariff provisions offer all-freight rates for single shipments moving in two-trailer lots on an allowed volume of 70,000 pounds providing that not more than 60 percent of the consignment consists of a single commodity. Thus, the association form of operation allows individual shipper-members the opportunity to match loads with other members and obtain volume rates whereas separately they might have an inadequate volume of freight or a lack of commodity variety to satisfy the mixing provision.

Defendant Barnes performs most functions for the association as its general agent and he is compensated on a per-trailer basis. Charges to shipper members are otherwise based upon the actual cost of the freight charges and services, including trailer rental and cartage fees. Barnes is also the controlling stockholder of Shippers Traffic Service, Inc. (The other stockholders consist of Barnes' wife and his attorney.) This corporation, which was organized in May of 1962, approximately a year after the instant complaint was filed, purportedly acts as a freight consolidator and shippers' agent at Philadelphia.

It uses the same office facilities and personnel that Barnes uses in his capacity as general agent of the defendant association. Shippers Traffic Service, Inc., performs a so-called "consolidation service" for the association when the latter has only one trailer to ship and it provides a matching trailer for movement to the same destination. These trailers are obtained from five individual shippers, Standard Pressed Steel, Sun Oil Company, Food Fair, Tung Sol Electric, and Dennis Mitchell Industries, none of whom are members of Columbia Shippers Association. Matching trailers are also obtained from several other actual or purported shippers' associations namely: Detroit Shippers Association, Associated Shippers, United Shippers Association, Piggy-Back Shippers Association of Florida, and an unnamed association operating eastbound from St. Louis. One member of the association, Blue Bird Products, is the only member shipping meats and meat products. It coloads at St. Louis with this unidentified association on movements to Philadelphia but has never combined traffic with another member of the defendant association. Columbia Shippers Association also participated in coloading with Delaware Valley Freight Terminal, another purported consolidator or shippers' agent. In most cases the coloaded shipments are in separate trailers on the same flatcar but in a few instances association traffic is coloaded in the same trailer with the freight of nonmembers. Shippers Traffic Service, Inc., in its role as "agent" is named on the rail billing as the consignor but not as consignee. Barnes testified that two consignees, usually local cartage companies, may be named. At the request of the association Barnes prepared a list of cartage agents at various points which the association ships to and he also negotiated certain oral or written arrangements as to rates and service. Of the points the association principally ships to, both Atlanta. Ga.. and Dallas, Tex., have only one cartage agent listed while Chicago, Ill., Detroit, Mich., and St. Louis, Mo., each list two or more. The specific cartage agent

is selected by either the shippers or the associations and Shippers Traffic Service, Inc., as agent, purportedly is not involved directly in any break-bulk, or distribution services outside of the Philadelphia commercial zone. On the few occasions where the association has commingled less-than-truckload shipments in the same trailer with similar shipments supplied by Shippers Traffic Service, Inc., they have been billed in the latter's name. When movements are solely for Columbia Shippers Association, Barnes prepares the billing in the association's name in his role as general agent. Otherwise, Barnes prepares the billing naming Shippers Traffic Service, Inc., as the consignor in his alternative role as shippers' agent. Shippers Traffic Service, Inc., receives a fee based upon the number of trailers handled. Barnes, as shippers' agent has discussed the possibility of acting as representative for other shippers' associations and, in his efforts to obtain business for Shippers Traffic Service, Inc., he uses a calling card with his name, the name of Shippers Traffic Service, Inc., and the address of both the latter and Columbia Shippers Association.

DISCUSSION AND CONCLUSIONS

The basic issue in this proceeding is whether the defendant association is operating as a bona fide shippers' association within the provisions of section 402(c) of the act or whether defendants are circumventing the regulatory scheme and conducting operations subject to the licensing requirements of section 410(a) of the act [1] without appropriate authority therefor. Section 402(c) provides that:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or dis-

[1] Section 410(a) provides that no person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service.

> tributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

On the other hand section 402(a)(5) of the act provides as follows:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this act.

I

Burden of Proof.—The recent series of proceedings involving the operations of shippers' associations has generated a certain amount of confusion regarding the question of burden of proof. In cases of this nature, we believe that a complainant has met its initial burden of proof when it has made a showing that defendants are performing operations which appear to be those subject to the involved regulation per the criteria of the *Atlanta*

Shippers case. For example, evidence showing that an association is holding out to serve the general public or profitmaking, that someone other than the membership of the association exercises direction and control over the association, or that the membership has failed to assume the necessary risks and burdens would require an association to come forward with rebuttal evidence. Defendants or respondents, as the case may be, then must negate the factual showing of the complainant. In short, we believe that the ultimate risk of nonpersuasion remains upon the complainant throughout the proceeding, regardless of whether it is the Commission or a private party. The burden of producing evidence, however, will shift from the complainant to the defendant once complainant has established a prima facie case.

On the record developed herein, we conclude that complainants have met their initial burden of proof and that the record provides an adequate basis upon which a decision can be predicated both as to an evaluation of the facts concerning the defendants' operations and any questions of law involving the proper statutory interpretation of section 402(c) of the act.

II

Association Risk and Burdens.—The pertinent criteria applicable to shippers' association cases such as this have been discussed extensively in the *Atlanta Shippers* case, *supra*, at pages 283, 285, and 288 and will not be restated here in detail. The basic test is whether the freight consolidating and distributing operations in question are such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risk and burdens, financial and otherwise, of conducting the operations. Here, we agree with the examiner that the shipper-members of Columbia Shippers Association are shown to control and bear the

responsibility of the association's operations and we adopt his statement of facts and conclusions in this regard.

Briefly, the record demonstrates that the idea and formation of the association was shipper motivated, that only shippers are members and that these shippers have exercised effective control over the association and the person who operates as their general agent, and have assumed the risks and burdens incident to the operation of the association. Although the general agent, Barnes, must deduct most administrative costs from his compensation, an account for certain expenses such as insurance is maintained by the association. Also, the membership has provided the capitalization for the association and the charges of the association are usually based on actual costs. Further, it appears that the directors of the association maintain control over new memberships, the selection of cartage agents, and the finances of the association except insofar as the day-to-day functions are delegated to the general agent. For example, while the record of receipts and expenses are kept by the general agent, those items are the subject of a monthly audit by the membership, and the bank account of the association is controlled by the secretary-treasurer. Accordingly, we are persuaded that the essential responsibilities, risks, and burdens are not upon the general agent but rather upon the association and we conclude that the defendant association is a bona fide shippers' association within the meaning of section 402(c)(1) of the act. Compare *National Motor Freight* v. *New Hampshire Shippers Co-Op.*, 323 I.C.C. 658.

It is true that complainants attack as meaningless the risks and burdens rationale of the *Atlanta Shippers* case particularly since the entire Commission in that case rejected the requirement of division 1 that members of an association be jointly and severally liable for the activities of the association. However, a similar argument was dealt with by the court in *Freight Forwarders Institute* v. *United States*, 263 F. Supp 460 (1967). As

noted in that case, it is sufficient that the major risk of financial loss *not* be borne by any party other than the shippers' association itself, whatever the limitations on individual members liability, as long as the members in good faith exercise responsible control over their association's operations. Also, as noted by the court at page 465 (referring first to our decision in *Atlanta Shippers*) "shippers who are members of a nonregulated association are responsible as the beneficial owners of the goods moved and cannot insulate themselves in that respect from third persons" and further that "this safeguard has been recently strengthened by requiring shipper associations to advise carriers which member is the beneficial owner of freight listed on the bill of lading. *Regulations for Payment of Rates and Charges*, 326 I.C.C. 483, 494-95 (1966)."

Complainants also contend that the examiner considered only the control portion of the dual tests of the *Atlanta Shippers* case. The examiner, however, quoted both the control and essential risks and burdens tests of the *Atlanta Shippers* case and applied both of those standards. It is true that the examiner tendered to merge his discussion of the "risks and burdens" with his discussion of "control" but this appears to be more a matter of style than of substance, particularly since the facts concerning "risks and burdens" and "control" are not entirely separable.

III

Coloading with nonmember traffic.—Although we believe that the defendant association meets the basic statutory requirements and that it is a bona fide shippers' association under section 402(c) of the act, it does not necessarily follow that all operations of the type here under consideration are exempt from regulation merely because a bona fide shippers' association is involved. We refer specifically to the activities of the association in coloading interstate traffic destined to points beyond a

single-terminal area (1) with traffic of other shippers' associations and with (2) the traffic of individual, for profit shippers and in particular to the activities of general agent Barnes insofar as he participates in the performance of these services.

As noted above, section 402(c) provides that certain operations "* * * of a shipper or a group or association of shippers, in consolidating or distributing freight for themselves or the members thereof * * *" are not subject to the provisions of part IV of the act. We believe that this provision requires that an association's transportation activities must be confined to service for association members as shippers or consignees.[2] This is in line with *Atlanta Shippers* case at page 382 where the following observation was made:

> A shipper organization, however, may not justify service to any nonmember simply on the ground that the profits it may receive from such service ultimately or indirectly benefit the organization's members by helping defray the cost of handling their own shipments. On the contrary, a group or association of shippers, in order to avoid regulation under the Freight Forwarder Act, must affirmatively stand aloof to the lure of a public calling and may not lawfully handle shipments unconnected with, and fundamentally unrelated to, the nontransportation functions of its member shippers. To conclude otherwise in this respect would be to allow shippers' group or association to engage indiscriminately and without limitation in the for-hire freight forwarding business and would be inconsistent with the clear legislative mandate outlawing the purchase and sale of unlicensed forwarding services generally. According-

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[2] Service by an association in connection with shipments from nonmembers-consignors to member-consignees is considered membership service. *Pacific Coast Wholesalers, Assn.*, v. *United States*, 81 F. Supp. 991, affirmed *per curiam*, *United States* v. *Pacific Coast Wholesalers' Assn.*, 338 U.S. 689 (1950).

> ly, and after careful reconsideration of this aspect of the total subject, we are convinced that whenever a shippers' organization handles in its service shipments owned by nonmembers, such shipments must be functionally related to an activity (other than transportation) of an association member. Otherwise, it is clear that such service is supplied by the association with a purpose to profit from transportation as such, as distinguished from a purpose merely to obtain for its members the savings of carload, truckload, or other volume rates; that the association is, in effect, a seller of freight forwarding service; and that the operation is, in substance, a common carrier freight forwarding service provided by the association for compensation.

Under these circumstances, we believe that a shipper's association cannot coload with nonmember, for-profit shippers; however, we are persuaded that a different conclusion should be reached when the subject coloading is between two bona fide shippers' association.

The legislative history establishes that in passing the Freight Forwarder Act in 1942, Congress was not concerned as such with the activities of nonprofit shippers' associations but, rather, with seeking to remedy certain abuses and discriminations which had been fostered by the lack of regulation of for-profit forwarders.[3]

Congressman Oscar Youngdahl, a member of the sponsoring Committee on Interstate and Foreign Commerce, specifically stated during House debate (87 Cong. Rec. 8223) that:

> * * * many forwarders and others were quite ready to have us deny to shippers the opportunity which such shippers had long enjoyed—that is, to consolidate their less-than-carload shipments into pooled cars. In this connection I might mention the provision of

[3] See Congressman Wolverton's statement during House consideration of conference report on S. 210, the bill which was enacted into law, 88 Cong. Rec. 4065.

> the bill which exempts from regulation forwarding operations confined to the handling of a single-general commodity. The fact is that for many years there have existed forwarding operations confined to the handling of a single-general commodity which were in essence and effect a cooperative operation, although sometimes conducted through an independent organization on a profit basis. *The bill undertakes to exempt operations which are cooperative in form and your committee also concluded that equivalent operations even though not strictly cooperative in form should likewise be exempted. Such organizations have been of longstanding and have not in general created the present situation which requires remedial legislation.* * * * [Emphasis supplied.]

Although the "single-general commodity" provision was deleted in conference and did not become part of the enacted measure, as did the provision for nonprofit shippers associations, it is quite clear from the content and context of the quoted passage and the reference to "operations which are cooperative in form" that Congressman Youngdahl's last sentence referred also to *nonprofit* cooperative operations.

Additionally, the Supreme Court's decision in *United States* v. *Pacific Coast Wholesalers Association, supra,* supports the conclusion (1) that two nonprofit shippers' associations may lawfully coload, and (2) that a nonprofit shippers' association may not coload with nonmember for-profit shippers. In the underlying Commission proceeding, reported at 264 I.C.C. 134 and 269 I.C.C. 504,[4] Pacific Coast Wholesalers Association was found not entitled to unregulated status under section 402(c)(1) upon the basis that the association handled shipments moving from nonmember-consignors to member-consignees on delivered-

[4] Although not discussed in the report and not at issue, the statement of facts in that case indicates that a similar association was permitted to ship its freight in cars consigned to Pacific Coast. See 264 I.C.C. at page 138.

price terms. In reversing that finding, the United States District Court for the Southern District of California held (81 F. Supp. 991, 995-96):

> Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member * * *, but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.
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> * * * * *
>
> Morover, both the purpose and the result of the transaction is not to benefit the (nonmember) shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.
>
> When this principal-agent relationship between member-purchaser and the association is borne in mind it is clear that there is no profit to the association from the activities described in the Commission's report * * *; and it is equally clear that the association, as agent for the members, does not "hold itself out to the general public * * * to provide transportation of property * * * for compensation" 49 U.S.C.A. § 1002(a)(5).

The Supreme Court affirmed the holding of the district court in a *per curiam* opinion, stating (338 U.S. 689, at page 691):

> * * * The court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, rather than that between buyer and seller, the court saw no reasonable ground for ruling that the

association was on a profit basis, or that it was holding its service out to the general public. We agree. There is nothing in the language of the act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b destination (delivered price). On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision.

Based upon the foregoing, we believe there is a distinction between the two separate coloading practices engaged in by defendants. When the defendant association allows its agent to combine its traffic with that of an individual, for-profit shipper it is holding itself out to the general public and is, in effect, a seller of freight forwarding service and the operation is in substance a common carrier freight forwarding service provided by the association for compensation contrary to the requirements of the *Atlanta Shippers* case, *supra*, at page 282. On the other hand, when the defendant association coloads with another shippers' association, both are engaged in the furtherance of their nonprofit activities pursuant to the statutory objective of section 402(c).

Stated differently, since section 402(c)(1) specifically allows shippers to form an association on a nonprofit basis, in order to secure the benefits of volume rates, we believe that coloading by two bona fide shippers' associations, neither of which holds out its services to the general public, is consistent with the statutory objective. As noted in the *Atlanta Shippers* case at page 277:

> * * * the Freight Forwarder Act clearly safeguards the right of all shippers to combine their goods, on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from their collective ability to utilize volume rates. * * *

There is nothing in the act or its legislative history to suggest that Congress intended to limit the exemption of section 402(c)(i) to internal coloading by members of a single nonprofit organization of shippers. Indeed, the absence of such a limitation is not inconsistent with section 1 of the Rules of Construction for Acts of Congress, 1 U.S.C. § 1. See also *Barr* v. *United States*, 324 U.S. 83 at page 91 (1945). Accordingly, we conclude that there is no specific bar to the practice of coloading by separate shippers' associations as long as the coloading benefits only the members of each shippers' associations and there is no holding out of service to the general public.

In reaching the foregoing conclusions, we are not unmindful of the argument of the complainants that while section 404(d) of the act specifically authorizes regulated forwarders to enter into agreements for the "joint loading" of traffic, there is no parallel provision applicable to shippers' associations. Section 404(d) allows a freight forwarder to use the employees and facilities of another freight forwarder and to engage in other mutual practices under certain conditions. See *Twin City Shippers Assn. Freight Forwarder Application*, 260 I.C.C. 307. However, the provisions of section 404(d) apply only to regulated forwarders and neither enlarge nor diminish the lawful scope of the operations of persons not subject to regulation. Compare *Kingpak, Inc., Investigation of Operations*, 103 M.C.C. 318, wherein it was found that the operations of exempt freight forwarders of used household goods are unaffected by the provisions of section 404(d). Accordingly coloading, as practiced by shipper associations, must stand or fall according to the substantive provisions of stction 402(c) of the act and is unaffected by the provisions of section 404(d) which apply only to regulated for-hire freight forwarders.

We also are unable to agree with the argument that decisions such as *Enterprise Trucking Corp. Contract Carrier Application*, 27 M.C.C. 264, *Irwin, Lyons-Exemption*,

Section 302(E), 265 I.C.C. 779, and *Schenley Distilleries Motor Division, Inc., Contr. Car. Ap.*, 44 M.C.C. 171, affirmed 61 F. Supp. 981 and 326 U.S. 432, dealing with for-hire motor and water carriers under parts II and III of the act are controlling of the instant case. As noted above, section 402(c)(1) provides that shippers may combine * * * for the purpose of securing the benefit of carload, truckload, or other volume rates * * *." No provision comparable to section 402(c) is contained elsewhere in the act and as a result the determination of the practices that shippers associations may properly engage in must be made solely within the four corners of the statutory provisions specifically applicable to such associations. Compare *Shipper Cooperative, Inc.* v. *Interstate Commerce Commission*, 308 F. 2d 888 (1962), which like the three cases cited immediately above, deals with operations subject to other parts of the act as opposed to activities governed by part IV. See also the *Atlanta Shippers* case at page 277.

As an addendum to our conclusion that coloading among shippers' association is lawful, we wish to make it clear that the substantive requirements of the *Atlanta Shippers* case, that the transportation activities of an association be under the direction and control of its shipper-members and that they bear the responsibility for such activities, cannot be avoided by resort to technicalities or paper arrangements. Just as coloading between shippers' associations cannot be condemned per se, neither can coloading between shippers' associations be sanctioned where the membership of any of the participating associations has defaulted on its overall obligation to maintain direction and control over or to assume the risks and burdens of the activities performed for its benefit.

In addition to coloading between shippers' associations, defendants use an agent, Shippers Traffic Service, Inc., to consolidate the trailers of independent, for-profit shippers along with the trailers of the defendant association at

Philadelphia and make available a service which contemplates the movement of the consolidated shipment to select destination points at cost plus a per-trailer compensation for the service. Defendants, thus, obtain new business from nonassociation shippers who might have a matching load to coload with the defendant association's traffic and, in effect, hold out service to the general public within the meaning of section 402(a)(5) of the act. As was said in the *Atlanta Shippers* case at page 282:

> A shippers' organization, however, may not justify service to any nonmember simply on the grounds that the profits it may receive from such service ultimately or indirectly benefit the organization's members by helping to defray the costs of handling their own shipments. On the contrary, a group or association of shippers, in order to avoid regulation under the Freight Forwarder Act, must affirmatively stand aloof from the lure of a public calling and may not lawfuly handle shipments unconnected with, and fundamentally unrelated to ,the nontransportation functions of its member-shippers. To conclude otherwise in this respect would be to allow shippers' groups or associations to engage indiscriminately and without limitation in the for-hire freight forwarding business and would be inconsistent with the clear legislative mandate outlawing the purchase and sale of unlicensed forwarding services generally.

Accordingly, we conclude that defendants' functions on behalf of individual, nonassociation shippers in providing for the movement of coloaded traffic bear all the essential attributes of regulated freight forwarding.

The defendant association contends that the consolidation service in question is legally performed by its agent, Shippers Traffic Service, Inc. However, we find that the consolidation service performed by Shippers Traffic Service, Inc., is under the effective control of the defendant association and that the defendant association cannot avoid responsibility in connection with the coloading of

member traffic with for-profit shippers through the use of a shippers' agent which, in fact, is the corporate alter ego of its own general agent. As previously noted, Barnes is the creator and owner of Shippers Traffic Service, Inc., which uses the same facilities and personnel as Barnes uses in his capacity as general agent of the defendant association and of course Barnes in his capacity as general agent is subject to the direction and control of the defendant association. We conclude, therefore, that the operations of a shippers' association and a shipper's agent cannot be combined so as to enable defendants jointly to provide essentially a complete freight forwarding service without appropriate authority. Compare *Southern Bonded Warehouse Co.—Investigation*, 318 I.C.C. 345 and *Natl. Motor Frt. Traf. Assn., Inc.* v. *Vendors Consolidating*, 326 I.C.C. 262. Barnes, in his multiple and conflicting roles, cannot do for the association what the association cannot do for itself and, the association, through its direction and control of Barnes, may not use Shippers Traffic Service, Inc., as an instrument to expand the scope of the association's activities to embrace those which are not otherwise permissible for a bona fide association operating under the exclusion of section 402(c) of the act.

The operations of Columbia Shippers Association in conjunction with Delaware Valley Freight Terminal, a freight consolidator, are not described with particularity on this record, but see *Natl. Motor Freight Traffic Assn.* v. *Delaware Valley*, 323 I.C.C. 560, affirmed in *National Motor Freight Traffic Assn.* v. *United States*, 242 F. Supp. 601 (1965), wherein the operations conducted by Delaware Valley were found not to be in violation of the act. The latter is employed by the former for the purpose of consolidating the traffic of members of the defendant association with the traffic of other persons. However, whether any of the operations performed by Delaware Valley for the defendant association are conducted in more than a single-terminal area is not shown on this record, nor does it appear whether the coloading that

occurs is limited solely to shippers associations. We are thus unable to make any specific adjudication herein relative to the defendant associations operations in connection with Delaware Valley. Compare the *Vendors* case, *supra*, at pages 272-73.

In summation, we conclude that the activities of an association of shippers excluded from regulation by section 402(c) of the act are limited to those activities conducted for shippers' association members, including the practice whereby one shippers' association coloads traffic with another "bona fide" shippers' association. Contrarywise, the practice by a shippers' association of coloading interstate traffic destined beyond a terminal area with the traffic of independent, nonmember shippers is a freight forwarding service which a shippers' association cannot perform for an individual shipper entity without violating the provisions of section 402(c) of the act.

Although Shippers Traffic Service, Inc., is not a party to this proceeding, it is operated by defendant Barnes. Said defendant will be required to personally cease and desist from the conduct of or participation in operations of the character found to be unlawful herein, and Shippers Traffic Service, Inc., shall be put on notice by this order to defendant Barnes that such operations may not be conducted. Thus, it is accordingly admonished to cease and desist from the performance of all operations of the character found to be unlawful.

Although our findings herein concerning the practice of coloading are intended to provide guidance in other proceedings, including those where jurisdiction has been retained on the question of coloading, it must be recognized that factual variations may require results different from that reached here. In those cases where jurisdiction has been specifically retained, the parties therein may file petitions requesting reopening and reconsideration of the coloading issue as applied to the pertinent records.

FINDINGS

On reconsideration, we find that defendants Columbia Shippers Association and Duane F. Barnes have been participating in or providing for the transportation of property, in interstate commerce, for compensation in the manner described in this report, without appropriate authority from this Commission; that certain operations, as described in this report, are subject to the licensing provisions of section 410(a) of the Interstate Commerce Act; that such operations are not within those functions of associations of shippers that are excluded from the provisions of part IV of the act as set forth in section 402(c) of the act; that an order should be entered requiring defendants to cease and desist forthwith and thereafter to refrain and abstain from the performance of, or participation in, any unauthorized operations in interstate commerce, of the character found in this report to be unlawful, unless and until appropriate authority is obtained from this Commission; and that in all other respects the complaint should be dismissed.

An appropriate order will be entered.

COMMISSIONER STAFFORD, dissenting in part:

I do not agree with the majority's treatment of the coloading issue. In my opinion, it does not matter with what kind of shipper or shipper group an association chooses to coload. The decisive question is whether the association, or the shipper with whom it coloads, receives from the other all the services of a forwarder. We may not conclude that an association acts as a forwarder merely because it cooperates with other shippers in informal groups to achieve the benefits of volume rates. There is more to forwarding than mere coloading.

There is ample authority for the conclusion that such informal shipper groups, if they do not offer complete for-

warding services to the general public, may not be treated as unlicensed forwarders. Part IV of the Interstate Commerce Act states this principle twice: once in sections 402 (a) (5) and (7) when it defines the services subject to regulations as those which usually entail holding out to the general public, consolidation, break-bulk, use of regulated line-haul carriers, and forwarder responsibility for the goods over the entire journey; and once again when it provides in section 402(c) that the provisions of part IV do not apply to nonprofit consolidation by groups or association of shippers.

The majority's device of calling shippers "for-profit shippers" cannot replace any of these statutory provisions, although it owes its superficial appearance of authoritativeness to one of them. The majority has mistakenly read section 402(c) as if its benefits were available only to shippers who do not engage in profit-seeking businesses, when, quite obviously, it is the transportation, not the shippers' primary businesses, which must not be conducted for a profit.

COMMISSIONERS SYPHERS and HARDIN did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its offices in Washington, D. C., on the 12th day of October 1967.

No. MC-C-3192 (Sub-No. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

It appearing, That on November 2, 1965, the Commission, division 1 entered its decision and order in the above-entitled proceeding dismissing the complaint;

It further appearing, That by order of December 7, 1965, the proceeding was designated as being of general transportation importance and that by order of April 14, 1966, upon consideration of petitions for reconsideration filed by complainants and intervener in support thereof, of the replies thereto, and for good cause shown, the above-entitled proceeding was reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the decision and order of November 2, 1965, are hereby referred to and made a part hereof:

It is ordered, That the said order of November 2, 1965, be, and it is hereby, vacated and set aside.

It is further ordered, That defendants Columbia Shippers Association and Duane F. Barnes be and they are hereby notified and required to cease and desist, and thereafter to refrain and abstain, jointly and severally, from

the performance of, or participation in, operations found in said report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained and that said defendants are also admonished to comply with the provisions of rule 1.99 of the Commission's General Rules of Practice.

It is further ordered, That the complaint in all other respects be, and it is hereby, dismissed.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as December 11, 1967.

H. NEIL GARSON,
Secretary.

[SEAL]